UNITED STATES
v.
LOLIET K. HEARD, ET AL.

IBLA 74-171 Decided November 18, 1974

Appeals from a decision by Chief Administrative Law Judge L. K. Luoma declaring one placer mining claim valid and four invalid. Oregon Contest 7448.

Affirmed in part; set aside and remanded in part.

1. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

Where gold values ascertained on a placer mining claim would not justify a prudent man in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, it is proper to declare the claim null and void.

2. Mining Claims: Discovery: Generally

Testimony by a government mineral examiner that he examined a mining claim but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government of a lack of discovery.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

In a government mining contest, where the contestant made a prima facie showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon the claimants.

4. Mining Claims: Discovery: Generally

Whether a prudent man would be justified in the further expenditure of labor and means with a reasonable prospect of developing a valuable mine on a mining claim does not depend on the circumstances of the individual mining claimant. The prudent man test is objective not subjective. The fact that a particular mining claimant may be willing to work a claim for a meager return does not warrant the conclusion that a person of ordinary prudence would be justified in attempting the same.

APPEARANCES: William L. Jackson, Esq., Baker, Oregon; Lyle W. Banton, Esq., Portland, Oregon, for contestees; Jim Kauble, Office of General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The U.S. Department of Agriculture has appealed from that portion of the decision of the Chief Administrative Law Judge, dated November 19, 1973, which declared the Heard placer claim valid for the reason that the claimant had shown a discovery of a valuable deposit of gold. Mrs. Loliet K. Heard and Emmett C. Thompson have appealed from that portion of the decision which held the Besta, Rondi, "The Mason" and Mason placer claims invalid.

A complaint was originally filed by the Bureau of Land Management at the request of the United States Forest Service on August 8, 1972, against the Besta, Rondi, "The Mason", Heard and Mason placer mining claims located within the Wallowa-Whitman National Forest in section 14, T. 10 S., R. 38 E., Will. Mer., Baker County, Oregon. The complaint charged that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery, and that the land within the claims is nonmineral in character.

The contestees, Mrs. Loliet K. Heard and Emmett C. Thompson, filed a timely answer denying the charges. After a hearing was held in Baker, Oregon, on December 20, 1972, the Administrative Law Judge ruled that the contestees had made a discovery of a valuable mineral deposit on the Heard placer claim, but found no evidence of a discovery on the other four claims.

The record shows that the claims are located southwest of Baker, Oregon, along Union Creek where gold has historically been mined in

the surrounding area. The Government's chief witness, Lloyd E. Holmgren, a United States Forest Service mining engineer, examined the claims in June 1967, June 1969, and July 1969 (Tr. 9). Holmgren testified that during the July examination, in the company of Contestee Emmett C. Thompson, he panned a one-half cubic yard sample of gravel to concentrate on the Heard placer claim (Ex. 2). He testified that no other discovery areas were pointed out to him by Thompson. Although, Holmgren made a general reconnaissance of the other claims, he took no other samples. He did not observe any gravels on the other claims (Tr. 22). He estimated that at the then prevailing market price of gold, $63.50 per ounce, the value of the sample would be approximately $2.00 per cubic yard (Tr. 19). He estimated that the Heard claim contains approximately 2000 cubic yards of such gold bearing gravels which, in his opinion, is not a sufficient volume of gravel to support a commercial operation (Tr. 11, 22). He also felt that available water was a limiting factor.

Holmgren believed a commercial operation was one from which an individual could make a day's wages and that to be considered a paying mine one would have to make, in his estimation, at least $20 per day (Tr. 17). In his opinion the gold values found would not justify the expenditure of one's time and means in an effort to develop a paying mine (Tr. 11, 23).

To counter the Government's case, Contestees presented the testimony of Ken Alexander, a local placer miner since 1946. He testified that he was generally familiar with the Heard placer claim, although he had never personally worked the claim (Tr. 30). He stated that if he lived on the claim he could make his "beans and bacon" (Tr. 33). He could not estimate the amount of gravel present (Tr. 33). He was not sure about the water supply on the claim but he stated that every time he had been there in the spring and summer there was sufficient water (Tr. 33).

Contestee Emmett C. Thompson testified he purchased an interest in the claims in 1965, although he had worked on the claims prior to such purchase (Tr. 39). Mr. Thompson is 67 years old and lists his occupation as a miner. He lives on Social Security and what he makes on the claims. He owns a 1972 Mercury; he has household furniture and appliances in his cabin on the claim; he has an investment of about $25,000 in his operation, including the cabin; and he owes no money (Tr. 47). He was not sure how much he made per year from the claims (Tr. 43), but he estimated that it was around $1,600 per year after paying all his expenses (Tr. 48). Mr. Thompson's total market for his gold is souvenir type trade (Tr. 52).

Thompson operated the claim for about four months in 1972. He admitted that the entire mining operation was confined to the Heard

placer claim, there being no operations on the other four claims (Tr. 49). He felt there was sufficient gravel on the Heard placer to continue to mine for 10 or 15 years and still recover the same kind of values or hopefully better ones (Tr. 51).

On appeal the Government contends inter alia the Judge erred in finding (1) that the contestee overcame the contestant's prima facie case of a lack of discovery on the Heard placer mining claim, and (2) that the Judge erred in finding that the claimant has made a comfortable living by selling gold from the Heard claim.

The contestees in turn request a reversal of the Judge's opinion as to the remaining four claims and a remand for further hearing of additional evidence as to these claims.

[1] In order to have a valid mining claim and be entitled to a patent, a mining claimant must show that there is physically exposed within the limits of each claim a valuable mineral deposit. A valuable deposit of minerals is one which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. (1905); Best v. Humbolt Placer Mining Co., 371 U.S. 334 (1963); Castle v. Womble, 19 I.D. 455, 457 (1894).

[2][3] When the Government initiates a mining contest it has only the burden of going forward with evidence to make a prima facie showing that the claim is invalid. The claimant then must show the validity of the claim by a preponderance of the evidence. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Taylor, 8 IBLA 264, 266 (1972). The Government is not obligated to prove affirmatively either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made. Testimony by a Government mineral examiner that he has examined a mining claim, but has found no evidence of a valuable mineral deposit, is sufficient to establish a prima facie case by the Government of lack of discovery of valuable minerals. United States v. Bunkowski, 79 I.D. 43, 51 (1972); United States v. Taylor, supra at 266.

The Contestees argue that the Government did not establish a prima facie case on the four claims declared invalid by the Judge. There is no merit in this argument. The Government introduced sufficient evidence through the testimony of Lloyd Holmgren that there is not a valuable deposit on these claims. The fact that no discovery points were specifically examined on the claims does not preclude a ruling of no discovery. Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the

discovery points of a claimant. Their function is to examine the discovery points made available by a claimant, and to verify, if possible, the claimed discovery. United States v. Humboldt Placer Mining Co., 8 IBLA 407, 79 I.D. 709 (1972); United States v. George Avgeris, 8 IBLA 316 (1972). If a mining engineer appearing as an expert witness, testifies that he has examined the claims and found nothing worth testing a prima facie case has been made. U.S. v. Coston, A-30835 (Feb. 23, 1968).

Holmgren examined the claims with contestee Thompson who requested only that samples be taken from the Heard claim. Contestees provided no further evidence of mining activity on the other four claims. They have mistakenly relied on the limited work on the Heard claim to establish the validity of the rest of the group. A claimant must show a discovery of a valuable mineral deposit within the limits of each claim. Even assuming, arguendo, a valid discovery on the Heard claim, that discovery, by itself, would not be a sufficient basis to validate the other four claims. A discovery on one claim cannot serve to validate a group of claims. United States v. Houston Bowman, 14 IBLA 122 (1973). The contestees did not meet their burden of proving discovery on the Besta, Rondi, "The Mason" and the Mason claims. Accordingly, we affirm the invalidation of these claims.

Turning next to the merits of the Administrative Law Judge's validation of contestees' Heard claim, we cannot agree with his holding that a discovery has been made on that claim. Based on the record before us we can only conclude that the contestees failed to overcome the government's prima facie case of no discovery. To succeed in this case the contestees must first have satisfied the essential elements of a discovery as originally set forth in the prudent man test of Castle v. Womble, supra. Application of this standard has been complimented by the concept of marketability, i.e., whether minerals for which a discovery is claimed are present in such quantity and quality that they can be extracted and removed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Where as in the case before us discovery is alleged for minerals of intrinsic value such as gold and silver, it is acknowledged that salability of the minerals may be assumed. However, in applying the marketability test this Board has acknowledged that a locator of a claim containing a precious mineral need not produce proof positive that the deposit could support a profitable mining operation. But the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. United States v. Harper, 8 IBLA 357 (1972).

[4] Whether a prudent man would go forward with developmental endeavors in an attempt to establish a profitable venture does not depend on the circumstances of the individual mining claimant. The prudent man test is objective, not subjective. The fact that a particular mining claimant may be willing to work a claim for a meager return does not warrant the conclusion that a person of ordinary prudence would be justified in attempting the same. United States v. Harper, supra, 369. This Board has recently considered similar circumstances of a one man placer gold operation where the claimant was making a limited return of $2.80 to $5.60 per day. We held that such mineral deposits which yield only meager profits are not valuable within the meaning of the general mining law, since no prudent man would invest in actual operations in those circumstances. United States v. King, 15 IBLA 210 (1974).

Testimony in the instant case, at best, indicates the same type of marginal return for the claimants. The Government's mineral examiner, Holmgren, estimated the extent of the gravel bed available on the Heard claim at 2000 yards. The claimants have not shown any greater supply within the limits of the claim. Holmgren testified that the sample taken from the claim showed a value of $2.00 per yard (Tr. 19) and that with hand labor mining costs would be $2.00 per yard. He considered a paying operation one that required a minimal return of $20.00 per day. He estimated, optimistically, the most that could be worked by the claimants in a day was 10 cubic yards (Tr. 24-5). He also doubted the availability of sufficient water to operate their sluice box (Tr. 19).

The statement of Ken Alexander, a local miner, that he could make his "beans and bacon" from this claim is considered less than a testimonial to the prudence of one seeking to further develop this location. It only serves to emphasize that to some men are willing to scratch out a living on a mining claim. The peculiar circumstances of this particular claimant having another source of income from social security upon which to tack a meager income from mining does not affect the prudent man test for a discovery.

Thompson testified that he worked the claim for approximately four months in 1972. During that period when he was mining he had hired a Mr. Potts as a helper for $15 per day. He estimated a return of $1600 per year, after expenses. Here we note that the claimant in calculating his net return has totally disregarded the value of his own efforts in working the claim. Where a mining claim is operated as a one man operation the value of the claimant's labor must be considered in determining whether a profitable venture has been established. United States v. White, 72 I.D. 522, 526 (1965); aff'd White v. Udall, 404 F.2d 334 (9th Cir. 1968). Assuming claimant could efficiently work 10 cubic yards a day at $2.00 per yard, and after considering $15 a day for a helper along with the value of his own labor in such

a venture, the true estimate of return is questionable. Such minimal return from working a claim would obviously not entice a person of ordinary prudence to develop the claim further.

Thompson's testimony is remarkable for its vagueness. He offered no assays. He gave no estimate as to the amount of material he had worked in the 7-8 years he had had an interest in the claims. He kept no records to support his assertion that he netted about $1600.00 a year from working the claim (Tr. 44). He paid no income tax (Tr. 48). He did not know how much yardage he and his part time helper, Potts, handled in a year.

Mrs. Heard, whose husband had owned the claim prior to his death, was no more specific. She showed several vials containing small amounts of gold, but she offered no testimony as to how much gravel was mined to obtain that gold. Neither did she testify to the economics of her husband's operation nor state whether she was deriving any income from her half ownership of the claim.

Little credence can be given to such unspecific testimony. It is the contestees' obligation to keep sufficient records to support his claim and he must suffer whatever consequences flow from his informal business methods. United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

To have achieved a profit of $1600 from 10 yards of gravel per day a year from the Heard claim contestees would have had to have processed at least 3000 yards of gravel, assuming their costs were only the $15 a day paid to Potts. This, of course, is not a reasonable assumption, for there are other costs, as we have seen, which must be taken into account. There is no testimony that anything like that amount of gravel was processed per year even since 1965 when Thompson bought into the claim.

Thompson, however, does not contend that he derived his income from selling in the regular gold market. He testified he sells his gold to tourists as souvenirs at whatever price he can get (Tr. 52). Mrs. Heard said her husband had operated in the same way (Tr. 54). Holmgren recognized that nugget gold suitable for use in jewelry draws a higher price than flour or flake gold (Tr. 58).

Whether a mining claim operated as a source of souvenirs falls within the contemplation of the mining law, we leave to another time. See United States v. Stevens, 14 IBLA 383, 393, 81 I.D. 83 (1974); United States v. Horn, 16 IBLA 211 (1974). Even if such an operation could validate a mining claim, the evidence presented here by the contestees is so deficient that a finding supporting the claim could not be made.

Turning now to evaluating the claim on the basis of sales made on the regular commercial market, we note that Holmgren based his opinion on gold at $35.00 on the domestic market or $63.50 on the world market (Tr. 19). The present price in the world market is more than double $63.50. Therefore, on the basis of Holmgren's one sample, the yield per yard now would be at least $4.00 a yard (Tr. 19), and if there were 2000 yards of exploitable gravel on the claim, an operation costing $2.00 a yard would yield a profit of some $4000.00.

Since Holmgren was satisfied that at the then price of gold and the then operating costs, there was no discovery on the claim, he took no further samples and relied only on an estimate for the volume of workable gravel. The increase in the price of gold diminishes the force of his conclusions. Therefore, it becomes important to determine whether the value of the sample is representative of the remaining gravels and how much gravel is left on the claim. To determine these factors, and any other relevant ones, a further examination of this claim should be made and the results presented at a rehearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Luoma is affirmed insofar as it held the Besta, Rondi, "The Mason" and Mason claims invalid and set aside insofar as it held the Heard claim valid and the case is remanded for a further hearing on the Heard claim.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge